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Supreme Court of the United States

DOCKET NO. 73-446

SLEGERS-FORBES, INC., a New Jersey Corporation,
and MALCOLM S. FORBES,

Petitioners,

vs.

NEW JERSEY HIGHWAY AUTHORITY,
A Body Politic and Corporate,
GARDEN STATE PARKWAY,
and JOHN B. GALLAGHER, Director,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR WRIT OF CERTIORARI AND APPENDIX IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

DOCKET No.

SLEGERS-FORBES, Inc., a New Jersey Corporation,
and MALCOLM S. FORBES,
Petitioners,

vs.

NEW JERSEY HIGHWAY AUTHORITY,
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GARDEN STATE PARKWAY,
and JOHN B. GALLAGHER, Director,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITION FOR CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgments of the Supreme Court of New Jersey and Superior Court of New Jersey, Appellate Division.

OPINIONS BELOW

The decision of the Appellate Division, Superior Court of New Jersey was filed on March 29, 1973 and a Order denying a Petition for Certification for review of the Appellate Division decision was entered on June 13, 1973. The opinion of the Appellate Division, Superior Court of New Jersey is unreported. The denial of certification by the New Jersey Supreme Court is unreported.

JURISDICTION

The judgment of the Superior Court Appellate Division of New Jersey was made and entered on March 29, 1973 and copies thereof are appended to this Petition in the appendix at pages 3 to 5.* An Order of the New Jersey Supreme Court denying a Petition for Certification was entered on June 13, 1973 and a copy is appended to this Petition in the appendix at page 6. The jurisdiction of this Court invoked under 28 U.S.C. 2101(c).

* All references to (Sa –) are to petitioner's Supplemental Appendix in the Superior Court of New Jersey, Appellate Division, which appendix has been certified and filed with this Petition as a part of the record below.

All references to (appendix at p. –) are to Appendix which is appended to this Petition.

QUESTIONS PRESENTED

The Petitioners, Slegers-Forbes, Inc., a New Jersey Corporation and Malcolm S. Forbes, filed a Complaint in lieu of Prerogative Writ seeking a declaratory judgment against the New Jersey Highway Authority and to declare the actions of the said New Jersey Highway Authority in its resolutions of 1961 and 1972 prohibiting motorcycles from using the Garden State Parkway as an arbitrary, capricious, unreasonable act and a denial of due process. The matter was transferred to the New Jersey Superior Court Appellate Division upon motion of the defendant, New Jersey Highway Authority. The New Jersey Superior Court, Appellate Division on the 29th day of March, 1973 found the resolution of the New Jersey Highway Authority banning motorcycles from the Garden State Parkway to be a reasonable exercise of the Highway Authority's power.

A Petition for Certification was filed with the New Jersey Supreme Court and on June 13, 1973 an Order was entered by the New Jersey Supreme Court denying the certification. The questions presented are:

1. Whether the action of the New Jersey Highway Authority prohibiting motorcycles from using the Garden State Parkway is a valid exercise of the police power.

2. Whether the action of the New Jersey Highway Authority prohibiting motorcycles from using the Garden State Parkway is arbitrary, capricious and unreasonable action.

3. Whether the action of the New Jersey Highway Authority violates the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioners' rights under the Fourteenth Amendment of the United States Constitution were denied by the action of the Defendant, New Jersey Highway Authority. The Fourteenth Amendment of the United States Constitution is set forth in the appendix at page 1.

STATEMENT OF THE CASE

Petitioners, Slegers-Forbes, Inc., a New Jersey Corporation and Malcolm S. Forbes, filed a Complaint in lieu of Prerogative Writ seeking a declaratory judgment against the New Jersey Highway Authority and the resolution in 1961 prohibiting motorcycles from using the Garden State Parkway. Malcolm S. Forbes, individually, was denied access to the Garden State Parkway at a toll booth in Bloomfield, New Jersey while riding a motorcycle. The Petitioners first raised the constitutional questions sought to be reviewed in their complaint filed in the New Jersey Superior Court, Law Division (Sa3). The Fourth Count of the Petitioners' Complaint filed in the Law Division of the Superior Court of New Jersey provided "The action of the Defendants is a denial of the state and federal constitutional rights of the Plaintiff to wit: The Fourteenth Amendment of the United States Constitution; Article I, section 8 of the United States Constitution, interference with interstate commerce; Article I, paragraph 1 of the State Constitution, a denial of the natural rights; and Article I, paragraph 5 of the State Constitution in that it denies civil rights"(Sa3). The Defendant, New Jersey Highway Authority filed an answer in the matter and subsequently filed a Notice of Motion for an Order Transferring the action from the Law Division of the Superior Court to the Appellate Division of the Superior Court. While the appeal was pending before the Appellate Division of the New Jersey Superior Court, the New Jersey Highway Authority ordered a supposedly independent investigation to determine whether motorcycles should be banned from the Garden State Parkway. The New Jersey Highway Authority ordered this "new investigation" because it realized its previous resolutions were arbitrary, capricious and unreasonable. The alleged investigation was a report by an

engineering firm Edward and Kelcey, Inc. paid for by the New Jersey Highway Authority. The cover letter of Edward and Kelcey, Inc. stated "We are pleased to present our findings in regard to the continued prohibition of motorcycles on the Garden State Parkway. It is our hope that the report provides the Authority's attorney a useful reference in preparing his defense to the case" (Appendix at p. 2). The alleged investigation was an obvious attempt to buttress a predetermined position. The Petitioners were not given an opportunity for a hearing by the New Jersey Highway Authority or to produce evidence of any type including expert testimony as to the safety of motorcycles nor did they have the opportunity to cross-examine the experts who prepared the reports for the New Jersey Highway Authority. The Appellate Division on the 29th day of March, 1973 found the resolutions of the New Jersey Highway Authority banning motorcycles on the Garden State Parkway to be a reasonable exercise of its power. In its opinion, the Appellate Division stated that the Petitioners charged that the resolution in question was unconstitutional in that it violated the Fourteenth Amendment of the United States Constitution (Appendix at p. 3). However, the Appellate Division did not specifically rule on the constitutional questions raised by the Petitioners. Failure on the part of the Appellate Division to rule on the constitutional questions was raised as reversible error and the Petitioners filed a Petition for Certification in the New Jersey Supreme Court.

REASONS FOR GRANTING THE WRIT

POINT I

The actions of the New Jersey Highway Authority prohibiting motorcycles from using the Garden State Parkway was a denial of due process in violation of the Fourteenth Amendment of the United States Constitution.

Due process is a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial. *Trustees of Dartmouth College v. Woodward,* 4 Wheat 518, 4 L.Ed. 629. The fundamental requirements of due process are an opportunity to be heard upon such notice and in such proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. It is an essential element of due process that persons affected be given an opportunity to defend, enforce and protect their rights and that they be afforded ample opportunity to make by evidence and argument a showing to establish the propriety or impropriety from the standpoint of justice and law of the steps, regulations or resolutions asked to be taken. Where the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. Due process implies the right to contradict by proof every material fact.

In *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 57 L.Ed 431, 33 S. Ct. 185 (1913), the United States Supreme Court said at page 186:

> "Administrative orders, quasi judicial in character, are void if a hearing was denied, if that granted was

> inadequate or manifestly unfair, if the finding was contrary to the indisputable character of evidence . . . or if the facts found do not, as a matter of law support the order made . . ."

The court went on to say at page 187:

> ". . . for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain or refute . . ."

All parties must be fully apprised of the evidence submitted or to be considered, and must be given an opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal.

It has been stated that an administrative order made indisputably contrary to the evidence, or without any evidence, must be deemed to be arbitrary and therefore subject to be set aside. *Louisville & N. R. Co. v. Finn*, 235 U.S. 601, 59 L.Ed 379, 35 S. Ct. 146 (1915); *ICC v. Union P. R. Co.*, 222 U.S. 541, 547, 56 L.Ed. 308, 311, 32 S. Ct. 108 (1912).

The New Jersey Highway Authority's resolution of 1961 banning motorcycles from the Garden State Parkway was clearly arbitrary and unreasonable and the Authority recognized this and ordered a new "investigation" while the appeal was pending before the Appellate Division of the Superior Court of New Jersey. The Petitioners were never given a hearing or an opportunity to present expert testimony while this alleged "investigation" was occurring. The alleged "investigation" was obviously an attempt to buttress an already previously determined position.

The Authority's suggestion that there was a "real opportunity to be heard" when the American Motorcycle

Association was invited in 1961 to appear before the Traffic Safety Committee to deliver a presentation concerning a study on motorcycle safety is not an acceptable substitute to the Constitutional guaranty of due process. An adequate hearing is a matter of right and a hearing granted as a matter of favor or discretion is not a substantial substitute. The requirements of due process are not met where the right of hearing is granted only on conditions so harsh and oppressive as to be tantamount to a denial.

The failure of the Authority to have a hearing either in 1961 or 1972 and allow the Petitioners an opportunity to present expert testimony was truly a denial of due process. The Petitioners and thousands of other motorcyclists are being prevented from driving on a public road without a fair hearing. Motorcyclists have been divested of the legitimate use of their property and the right to use a public road in the same manner and for the same purposes as other motorists without an adequate hearing to present testimony or to test, explain or refute the Authority reports so that the Authority and courts would have a complete record to make a determination whether there was a reasonable basis for the banning of motorcycles.

POINT II

"The actions of the New Jersey Highway Authority in its resolutions of 1961 and 1972 prohibiting motorcycles from using the Garden State Parkway was arbitrary, capricious and unreasonable and was a denial of the equal protection clause of the Fourteenth Amendment to the United States Constitution."

The guaranty of equal protection of the laws requires that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and

in the liabilities imposed. While the guaranty of like treatment to all similarly situated permits classification, there is an indisputable requirement that the classification be reasonable and not arbitrary and be based upon substantial differences having a reasonable relation to the objects or persons dealt with and the public purpose sought to be achieved. Petitioners submit that the New Jersey Highway Authority has acted in total disregard of this constitutional guaranty.

It is obvious that the Authority is attempting to promote the safety of persons and property using the Garden State Parkway. But the restrictions imposed must be reasonable and not go beyond the public need. A restriction that regulates only a few is arbitrary while the mere classification of persons to diminish an evil is discriminatory. Both of these constitutional criticisms are applicable to the Authority's resolutions.

The question of equal protection is answered or determined on practical considerations based on experience rather than by theoretical inconsistencies. *Patsone v. Commonwealth of Pennsylvania*, 232 U.S. 138, 144, 34 S. Ct. 281, 282, 58 L.Ed. 539 (1914). There is no factual or legal basis to treat motorcycles differently than automobiles in their use of the Garden State Parkway. Both types of vehicles use the road in an ordinary way. The Supreme Court has upheld as valid statutes and regulations that base classification on business or commercial use of roads and highways. See *Railway Express Agency, Inc. et al. v. People of State of New York*, 336 U.S. 106, 69 S. Ct. 463, 93 L.Ed. 533 (1949); *Whitney, et al. v. Johnson, et al.*, 37 F. Supp. 65 (Dist. Ct. E.D. Ky. 1941), *af.* 314 U.S. 574, 86 L.Ed. 465, 69 S. Ct. 117; *Walton, et al. v. City of Atlanta, et al.*, 89 F. Supp. 309 (Dist. Ct. N.D. Ga., 1949), *mod.* 180 F.2d 143, *set aside* 181 F.2d 693, *cert. denied*, 340 U.S. 823, 95 L.Ed. 604, 71 S. Ct. 56.

The Court in *Walton, et al. v. City of Atlanta, et al., supra,* held that the Legislature may not under the guise of the police power impose restrictions that are unnecessary and unreasonable upon the use of private property or pursuit of useful activities. The Court said that the streets belong to the public and are primarily for the use of the public, in an ordinary way, but their use for purposes of gain is special and extraordinary and generally may be prohibited or conditioned as the legislature deems proper.

There was no evidence, testimony, reports, or opinions of either a scientific, mechanical, or engineering nature upon which the Authority could base its conclusion that motorcycles should be banned from the Parkway. The Authority's classification was not valid since it did not rest on material differences or substantial distinctions between motorcycles and automobiles which bear a relation to the safe use of the road. There is no relationship between the Authority's attempt to regulate for the safety of persons or property and banning motorcycles from the road.

In *Turner v. Fouche,* 396 U.S. 346, 24 L.Ed.2d 567, 90 S. Ct. 532 (1970), the United States Supreme Court held that the traditional test is whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective. Petitioners submit that the Authority's decision to prohibit motorcycles from the Parkway does not fulfill the purpose intended.

In determining the reasonableness of the resolution of 1961 one must look to the evidence before the New Jersey Highway Authority by which it based its conclusion to ban motorcycles from using the Garden State Parkway. The facts are fully set forth in the supplemental appendix page 14a through 30a.

The main document relied on was a memorandum dated October 13, 1960 from Melvin J. Kohn, Traffic Engineer (Sa19-Sa22).

These statistics speak for themselves and Mr. Kohn on page 3 of his report (Sa21) shows that over a period of more than 6 years motorcycle accidents represent 4/10ths of 1% of the total accidents, 72/100ths of 1% of the total injuries and 2.13 per cent of the total fatalities, which he admits is "relatively small."

Mr. Kohn attempts to give a meaning to these statistics in accordance with the obvious desire of Milton Levy, Chairman of the Traffic Safety Committee as expressed in his memorandum dated September 14, 1960 (Sa17) a copy of which went to Traffic Engineer Kohn. A manual count of motorcycles was performed from Tuesday, October 4, 1960 through Monday, October 10, 1960, which count has little meaning as admitted by Mr. Kohn on page 3 (Sa21). Mr. Kohn made his own guess at the total annual volume of motorcycles to be not in excess of 10,000 and he himself admits that even based on his estimate the number of motorcycle accident injuries and fatalities is relatively small but concludes that motorcycles represent a somewhat disproportionate share of accidents (Sa21).

Mr. Kohn goes on to say on page 3 of his report (Sa21):

> ". . . and perhaps the most important in analyzing the desirability of banning motorcycles on the Parkway, is the public acceptance of such a step . . ."

which has no relationship to reasonableness. He then goes on to say that it could be considered the Authority is saving the cyclists from themselves. He then concludes on page 4 of his report (Sa22):

> In conclusion, it appears that the Authority could very well ban motorcycles from the Parkway, assuming the legality is cleared, on the basis of general public acceptance and the fact that motorcycles contribute to a disproportionate share of accidents, injuries and fatalities.

In addition to Mr. Kohn's report there was a letter from Thomas J. West (Sa23) dated October 18, 1960 suggesting that Mr. Kohn's report be sent to Parsons, Brinckerhoff, Quade and Douglas and that their opinion be asked in the matter. This was an obvious step by the General Attorney to buttress his already determined position.

Parsons, Brinckerhoff, Quade and Douglas in their letter of December 29, 1960 (Sa24) wherein they acknowledged the request that they analyze the report by the Authority's Traffic Engineer concerning the use of the Parkway by motorcycles and submit their opinion. In fact they did just that and drew their conclusions right out of Mr. Kohn's report almost word for word without any evidence whatsoever of any additional outside efforts, studies, traffic counts, or comparisons to other limited access highways. In fact there is *nothing* in their report to justify their conclusions. They make a flat statement that a two-wheeled vehicle, is not compatible with the other vehicles using the Parkway, without any reasons or evidence supporting the statement and they conclude as follows (Sa26):

> We recommend, on the basis of the foregoing, that in the interest of safety for both the motorcyclist and the great bulk of Parkway users, serious consideration be given by the Authority to amending the Regulation to prohibit the use of motorcycles on the Parkway.

The next item submitted by the Highway Authority was a memorandum dated December 23, 1960 from the

Traffic Safety Committee (Sa27). The memo recommends a ban with no evidence of findings and determinations and on January 5, 1961 the resolution 1961-10 was adopted in its full text (Sa29, Sa30).

The New Jersey Highway Authority resolution of 1961 banning motorcycles from the Garden State Parkway was clearly arbitrary and unreasonable and the New Jersey Highway Authority recognized this and ordered a new "investigation" while the appeal was pending before the Appellate Division of the Superior Court of New Jersey. The alleged "investigation" was obviously an attempt to buttress an already previously determined position.

Today there is no other high speed toll road, turnpike or expressway in the United States other than the Garden State Parkway that prohibits access of motorcycles.

Michael F. Bondy, an engineer and motorcycle expert in comparing the inherent safety of a motorcycle versus an automobile stated:

> "Perhaps we should touch on the inherent safety of a motorcycle versus an automobile and I have here statistics prepared by The National Safety Council, the 1971 edition of Accident Facts and this information is on page 64 and that is the only date that I know of which compares accident rates for what I would assume are equally-skilled operators for both the automobile and the motorcycle.
>
> I am referring to accident rates of municipal patrol cars versus two-wheel motorcycles operated by the police. The accident rate per million vehicle miles for a three year period from 1967 through 1970 for municipal patrol cars is 34.72, compared with 31.12 for two-wheel motorcycles. I feel that this comparison is very significant. It indicates that if skilled operators use a motorcycle, they can maintain an

> accident rate which is lower than that for an automobile under certain circumstances and in similar environments" (Sa83, 16-25; Sa84, 1-7).

Mr. Bondy testified that the Motorcycle Industry Council as well as the Department of Transportation have improved and continue to improve the safety of motorcycles (Sa83, 7-15).

Liability insurance for motorcycles is now readily available and the premiums have gone down over the years (Sa84, 19-25; Sa85, 1-25; Sa86, 1-19).

The New Jersey Turnpike Authority provided Mr. Bondy with the statistics of motorcycles involved in accidents (Sa36 and Sa37). It is interesting to note that the percent of motorcycles involved compared to the total number of accidents in all cases is less than 1/2 of 1%.

The afore-cited testimony is only part of the record that could have been presented if an actual investigation had been conducted by the New Jersey Highway Authority and if the petitioners had an opportunity to cross-examine the Engineers who prepared the report for Edwards and Kelcey, Inc.

The petitioners and thousands of other motorcyclists are being prevented from driving on a public road without a reasonable basis. There is no reasonable relationship between the prohibition in 1961 and 1972 of motorcycles on the Garden State Parkway and the health, safety and welfare of the public.

The Garden State Parkway is a North-South public toll road connecting the New York Thruway with the southerly tip of the state in Cape May County. This highway affords its users a high speed limited access route to many of the work and recreational areas in this state. The Parkway is used by commuters and travelers to reach

their destinations throughout New Jersey. It is uncontradicted that this highway is a safe means of travel to almost any part of the state since it also connects with and intersects with other east-west and north-south highways and roads. Thus the action of the Highway Authority has prevented thousands of motorcyclists from safe and quick access to jobs and recreation.

By its actions the Authority has summarily prohibited thousands of motorcyclists from using this public road without a fair or adequate hearing. How can this court or any court permit an administrative body to adversely affect the rights of a large segment of the public without the opportunity to present testimony to protect their rights? The answer must be in the negative. This court can not sanction the actions of the Authority. The Authority has blatantly ignored the petitioners' rights and guarantees of equal protection and due process. We can not disregard and dismiss such wilful violations of these Constitutional guarantees even though such actions be under the guise of the police power or an attempt to promote health, safety, and welfare of the public.

The Authority's decision to ban motorcycles from the Parkway was based on statistical analysis and projections without the ability to relate the number of motorcycles using the Parkway. It is submitted that this theory of statistical projection can be applied to other types of motor vehicles and persons so that sports cars, foreign cars and motorists under 25 years of age can also be banned from the road because they have a higher ratio of accidents compared to other classes of motorists. The theory, method, and results are clearly unreasonable.

It is difficult if not impossible to comprehend how one can proceed from the premise that a certain percentage of motorcycles have accidents (which premise can

not be factually proven) to the conclusion that they are unsafe. Assuming that the alleged facts and evidence upon which the Authority bases its conclusion are accurate and true, how can the objective of road safety be fulfilled? If motorcycles are banned from one of New Jersey's safest roads but are then permitted on all other roads then the dangers and hazards are merely increased elsewhere throughout the state and the purported objective, safety, is not satisfied or accomplished. This is merely another indication of the unreasonableness of the Authority's classification and discriminatory actions.

The petitioners do not ask this court to pass upon the credibility of witnesses or conflicts in testimony or weigh evidence in order to determine whether the resolutions are sound or appropriate, but rather the court is petitioned to uphold the Constitutional guarantee of equal protection of the law and due process. In denying or granting this petition the United States Supreme Court will not decide the factual issues of motorcycle safety. But if the court refuses to grant *certiorari* it will lend credence to the Authority's denial of equal protection and due process. The United States Supreme Court can not permit so blatant a disregard of the individual's constitutional rights to continue without a hearing. This Court must enforce these rights which we hold so preciously less other administrative bodies will take the same callous and indifferent approach to these guarantees. The Supreme Court can not permit an administrative weathering away of the Constitutional guarantees. We cannot allow these discriminatory practices and procedures to continue and must give motorcyclists their right to be heard and extend to them the equal protection of the law. Administrative bodies are increasing in number and power in both the state and federal governments. These bodies have enormous potential for doing good or evil in such areas as en-

vironmental protection and conservation of natural resources. The lives of thousands of Americans could be adversely affected if not for the procedural due process safeguards of the United States Constitution. Petitioners respectively request the Court to be cognizant of the ramifications which a denial will have on all individuals similarly situated.

To turn these petitioners away from the benevolent protection of this Court would be tantamount to this Court approving the continued deprivation of the individual's constitutional rights.

It is obvious that the Authority's decision to ban motorcycles was based on preconceived notions and opinions about motorcycles and the people who drive them. The report submitted to the Authority emphasized that a most important factor in banning motorcycles, " . . . is public acceptance of such a step . . ."(Sa21). Petitioners submit that because of changing social customs, application of safety standards and inspections to motorcycles as well as economic conditions including the energy crisis and the need for conserving gas the number of motorcyclists has and will continue to increase dramatically.

Petitioners do not intend to imply in this argument that increasing numbers of motorcycles is the basis upon which to set aside the prohibition. But merely attempt to indicate that this Court has never accepted as the criteria in protecting constitutional guarantees that persons must be a member of the majority, hold popular views or follow a course of conduct accepted by the public. Mere numbers or popular acceptance have no relationship to reasonableness.

Whether or not motorcycles should be banned can only be decided on facts gathered in a fair and adequate hearing.

The Authority's decision can only be upheld if it is reasonable. But without facts gathered at a fair and adequate hearing the Court has no basis to sustain the prohibition.

The Court's primary function is to protect the rights of the individual. We can not tolerate a governmental agency to be so oblivious to the guarantees of due process and equal protection of the laws.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ William E. Ozzard
WILLIAM E. OZZARD
Attorney for the Petitioners

SUPREME COURT OF THE UNITED STATES

DOCKET No.

SLEGERS-FORBES, INC., a New Jersey Corporation,
and MALCOLM S. FORBES,

Petitioners,

vs.

NEW JERSEY HIGHWAY AUTHORITY,
A Body Politic and Corporate,
GARDEN STATE PARKWAY,
and JOHN B. GALLAGHER, Director,

Respondents.

Amendment XIV

§1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Cover Letter from Edwards and Kelcey, Inc. to New Jersey Highway Authority

Mr. John P. Gallagher
Executive Director
New Jersey Highway Authority
Garden State Parkway
Woodbridge, New Jersey 07095

Subject: Motorcycle Operation and Safety—
The Garden State Parkway

Dear Mr. Gallagher:

In response to your request of August 3, 1972 and subsequent Commission approval of August 24, 1972 we are pleased to present our findings in support of the continued prohibition of motorcycles on the Garden State Parkway. It is our hope the report provides the Authority's attorney a useful reference in preparing his defense of the case.

The assistance and direction provided by legal counsel to the Authority, Mr. Kelaher, general counsel Mr. Kravarik and other Authority staff members is gratefully acknowledged.

We appreciated the opportunity to serve the Authority on this interesting assignment.

Very truly yours,

EDWARDS and KELCEY, INC.

/s/ George H. Leland
GEORGE H. LELAND
President

GHL:bam
Encl.

Decision of the Appellate Division,
Superior Court of New Jersey
Dated March 29, 1973
(Filed March 29, 1973)

Submitted: March 12, 1973—Decided: March 29, 1973

Before Judges Fritz, Lynch and Trautwein.

On appeal from the decision of the New Jersey Highway Authority.

Messers. Ozzard, Rizzolo, Klein, Mauro and Savo, attorneys for appellants (Mr. George A. Mauro, Jr. on the brief).

Messers. Hiering, Grasso, Gelzer & Kelaher, attorney for respondent (Mr. Sheldon R. Franklin, attorney).

PER CURIAM

Plaintiffs challenge as arbitrary, capricious and unreasonable a 1961 resolution adopted by defendant New Jersey Highway Authority whereby the use of motorcycles is barred on the Garden State Parkway. They also charge that the resolution is unconstitutional in that it violates the Fourteenth Amendment of the United States Constitution. In any event, say plaintiffs, there is no reasonable relationship today between the prohibition in 1961 of motorcycles on the Parkway, and the health, safety and welfare of the public.

Administrative regulations such as that here involved are endowed with a presumption of validity and unless clearly ultra vires on their face, the person attacking them has the burden of proving otherwise. Cole Nat. Corp. v. State Bd. of Examiners, 57 N.J. 227, 231 (1970). It is well recognized that the Highway Authority has broad powers in the area of traffic flow. McKenna v. N.J. High-

way Authority, 19 N.J. 270, 281 (1955); N.J.S.A. 27:12B-18(g). Though a regulation of motor vehicles, even to the extent of their complete exclusion from particular streets may be considered drastic, a court is not at liberty to substitute its judgment for that of the governing authority where the regulation bears a direct relationship to the public safety and is reasonable and not arbitrary. Garneau v. Eggers, 113 N.J.L. 245 (Sup. Ct. 1934). And we may not substitute our independent judgment for that of an agency such as the Highway Authority where its findings are supported by substantial evidence.

Plaintiffs rely on State v. Ernst, 110 N.J. Super. 520 (Cty. Ct. 1970), where the court held invalid a regulation of the Atlantic City Expressway Authority which prohibited operation of motorcycles on the Expressway. The only evidence in support of the regulation there was a report prepared for the Garden State Parkway concerning prohibition of motorcycles on that highway, and a letter from a State Police Lieutenant assigned to the Expressway. The court found that neither document afforded support for the Expressway regulation. As the court said, the Garden State Parkway report was prepared for a "completely different roadway, with different characteristics and mileage," and the Lieutenant's letter "as a basis upon which to adopt a regulation excluding motorcycles is of doubtful value, considering the fact that it was based on his personal beliefs and observations rather than empirical data." 110 N.J. Super. at 526.

Not so here. The instant regulation was bottomed on reports of the Parkway Traffic Engineer Kohn, the Parkway Operations Manager, and the engineering firm of Parsons, Brinkerhoff, Quade and Douglas. Mr. Kohn concluded that motorcycles caused 40 times their proportionate share of accidents, resulting in 72 times their proportionate share of injuries, and 213 times their pro-

portionate share of deaths. The report by the Parsons firm stated, among other things, that a motorcycle is not suited to cope adequately with bumper-to-bumper, stop-and-go traffic as, for example, encountered on the Parkway in Essex County during rush hours. It concluded: "As the motorcycle, a two-wheeled vehicle, is not compatible with the other vehicles using the Parkway, it is our opinion that increased safety would be attained by a more homogeneous traffic stream from which motorcycles, as a completely different vehicle type, would be eliminated." As a result of these reports and the recommendation of the Traffic Safety Committee, the Authority adopted the subject resolution. Because of the instant challenge to the regulation, the Parkway employed an engineering consultant, Edwards and Kelcey, Inc., to make a current study. In October 1972, that firm filed an extensive report entitled: "Motorcycle Operation and Safety—The Garden State Parkway—October 1972." It concluded that all relevant factors " * * * clearly indicate that the continuance of the prohibition on motorcycle use is in fact both necessary and desirable for the safety of persons and property on the Garden State Parkway." On October 6, 1972, the Highway Authority, relying on the report of Edwards and Kelcey, Inc., adopted a resolution reaffirming the prior resolution excluding motorcycles from the Parkway.

Since there is substantial evidence in the record in support of the reasonableness and viability of the regulation in question, we affirm.

A TRUE COPY

/s/ Mortimer G. Newman, Jr.
Clerk

Order of Supreme Court of New Jersey
(Filed June 13, 1973)

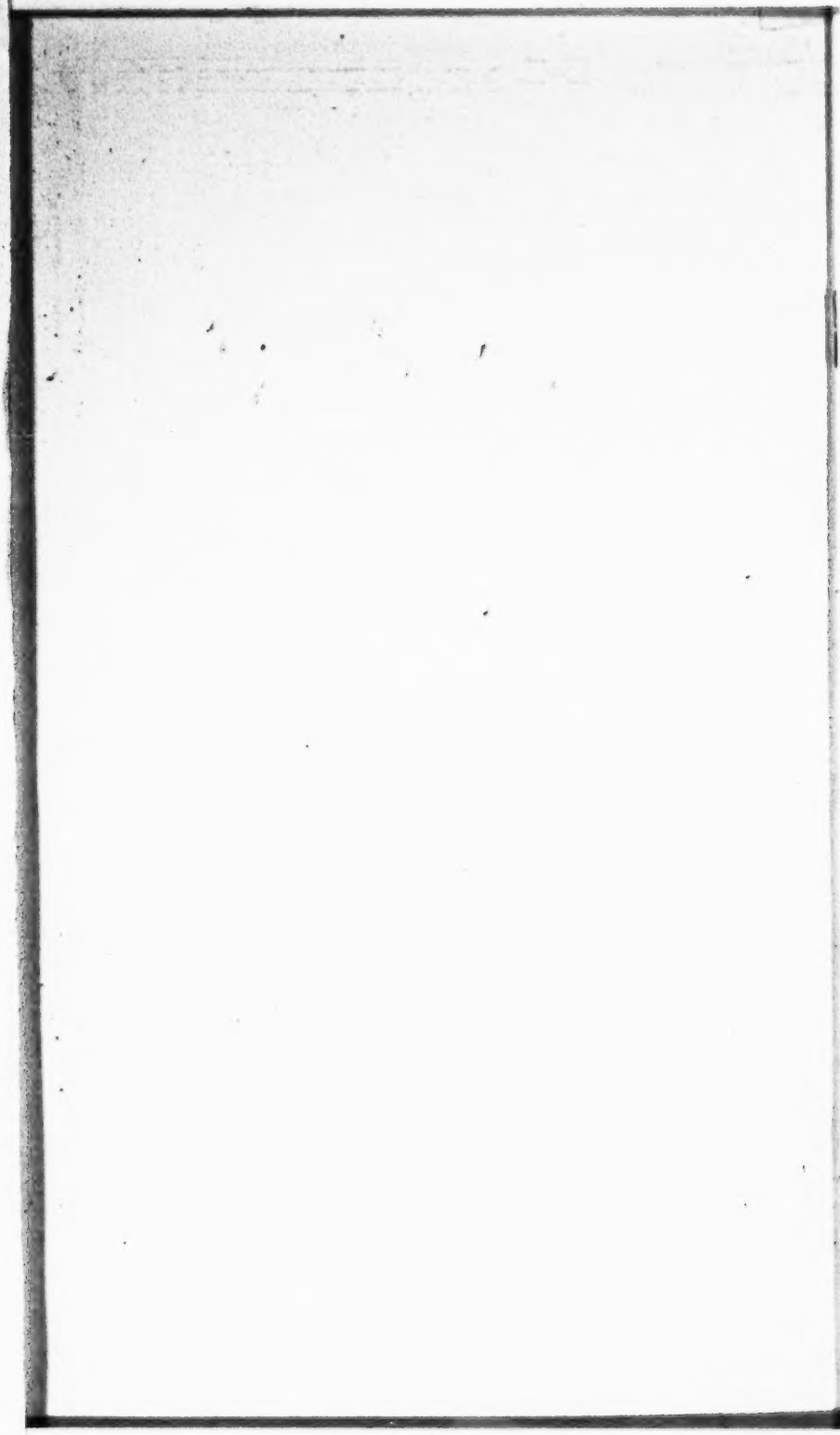
To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

Witness, the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 13th of June, 1973.

/s/ Florence R. Peskoe
Acting Clerk



Supreme Court, U. S.
FILED
OCT 5 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

DOCKET NO. 73 446

SLEGERS-FORBES, INC., a New Jersey Corporation, and MALCOLM S. FORBES,

Petitioners,

vs.

NEW JERSEY HIGHWAY AUTHORITY, A Body Politic and Corporate, GARDEN STATE PARKWAY, and JOHN B. GALLAGHER, Director,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF AND APPENDIX IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Appellees-respondents concur with that portion of Petitioner's Statement of the Case regarding the proceeding of the complaint filed in the New Jersey courts and its disposition. However, with regard to the investigation conducted by the New Jersey Highway Authority, appellees-respondents add the following:

On September 14, 1960 the chairman of the Traffic Safety Committee of the Garden State Parkway advised the Parkway's executive director that the Committee recommended that a study be made of the effect of motorcycle traffic on Parkway safety. The recommendation was based upon the Committee members' observation to traffic over several years, and also on the fact that two fatal accidents involving motorcycles constituted almost eight per cent of total Parkway fatalities over a fourteen month period.

On October 13, 1960, the Parkway Traffic Engineer filed with the Operations Manager of the Parkway a memorandum concerning the history of motorcycle operation on the Parkway.

On December 29, 1960 the Executive Director of the Parkway received a further analysis from Parsons, Brinckerhoff, Quade & Douglas, Engineers.

Based upon these reports and the recommendations of the Traffic Safety Committee, as well as the respective individual experience and expertise of the members of the New Jersey Highway Authority, a Resolution was adopted on January 5, 1961, which prohibited the use of the Parkway by motorcycles.

Based upon the within challenge to the continuing validity of the said Resolution, the Parkway had Edwards

and Kelcey, Inc., an engineering consultant, undertake an extensive investigation into the present relationship of motorcycles to other vehicles on controlled-access highways. The resulting report entitled "Motorcycle Operation and Safety, The Garden State Parkway" was submitted to the Executive Director of the Parkway in October 1972.

On October 26, 1972, having considered the findings of Edwards and Kelcey, Inc., the New Jersey Highway Authority determined that "the motorcycle is incompatible with the other vehicles using the Parkway and that increased safety would be attained by a more homogenous traffic stream from which motorcycles, as a completely different vehicle type, should be eliminated." The Authority reaffirmed their resolution prohibiting motorcycle traffic on the Parkway.

REASONS FOR DENYING THE WRIT

POINT I

The New Jersey Highway Authority regulation under attack is a valid exercise of that body's administrative powers and complies with the due process requirements of the Fourteenth Amendment of the United States Constitution.

The New Jersey Highway Authority was created by *N.J.S.* 27:12B-4 in 1952. The Authority, a body corporate and politic, was endowed with the power "to establish and enforce rules and regulations for the use of any project." *N.J.S.* 27:12B-5(j). In accordance with other sections of the New Jersey Highway Authority Act, the Authority is authorized and empowered by *N.J.S.* 27:12B-18(g) to adopt regulations "concerning types, weights and sizes of vehicles permitted to use such project, . . . together with any and all regulations adopted by the Authority to control traffic and prohibit acts hazardous in their nature or tending to impede or block the normal and reasonable flow of traffic upon such project;" provided certain predesignated steps are followed.

Pursuant to its statutory authority, and as a result of the sequence of events set forth above, the Authority determined that it was necessary and desirable to prohibit motorcycle traffic from the Garden State Parkway. A resolution to that effect was adopted on January 5, 1961.

Administrative orders are presumed to be valid. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 69 S. Ct. 968, 93 L.Ed. 1231 (1949). When a legislative action is challenged as arbitrary, the challenge must fail if any state of facts reasonably can be conceived in support of the enactment,

and a court of law will presume the existence of these facts unless the challenger can show the contrary. *Pacific States Box and Basket Co. v. White*, 296 U.S. 176, 59 S. Ct. 159, 80 L.Ed. 138 (1935). Therefore, the burden of showing that the regulation of the New Jersey Highway Authority is invalid is on the plaintiffs. This burden is only carried by showing as a minimum that the regulation is inconsistant with the underlying statute, or is unreasonable or inappropriate. *U.S. ex rel. Knauff v. Watkins*, 173 F.2d 599 (C.A. N.Y. 1949); *aff'd* 338 U.S. 537, 70 S. Ct. 309, 94 L.Ed. 317 (1950).

There can be little doubt as to the validity of such a regulation as we have here. The Highway Authority responded to a situation which threatened the lives and safety of those who used the Garden State Parkway, and on January 5, 1961, enacted a regulation, in accordance with its statutory authority, banning motorcycles from the Parkway. The Authority in doing so relied both on its own expertise and on the results of several reports, all of which pointed to the fact that motorcycles constituted a great hazard both to their operators and to other motorists when used in traffic situations commonly found on the Parkway.

Petitioners, however, contend that the Authority acted arbitarily and unreasonably and without due process in enacting the regulation. Their claim, totally unsupported, is that they were denied an opportunity to be heard when the Authority was conducting its study in 1960. In legislation or rule-making, there is no constitutional right to a hearing. *Superior Oil Co. v. Federal Power Commission*, 322 F.2d 601 (C.A. Tex. 1963), *cert. den'd* 377 U.S. 922, 84 S. Ct. 1219, 12 L.Ed. 215, *rehearing den'd* 377 U.S. 960, 84 S. Ct. 1625, 12 L.Ed.2d 504 (1964). Where a rule of conduct applies to more than a few people, it is

impracticable that everyone should have a direct voice in its adoption. *Bi-Metallic Investment Co. v. State Board*, 239 U.S. 441, 36 S. Ct. 141, 60 L.Ed. 372 (1915).

The Authority, of course, realized it would be impractical to invite all motorcyclists to present their views on the proposed resolution. Therefore, it held a special meeting on December 23, 1960, at which time the American Motorcycle Association was to deliver a presentation concerning a study on motorcycle safety. The Association is recognized as a voice of motorcycling interests, and the Authority felt they might have information directly related to the study being conducted. However, the Association failed to appear and failed to submit any type of written presentation. Although the Association was again invited to submit its presentation, it failed to do so. An opportunity to be heard had clearly been afforded, but not taken advantage of.

Petitioners have insinuated, without any support for such a contention, that the Authority conducted a new study of the matter in 1972 since it realized that the 1960 study and resolution was arbitrary and unreasonable and that it needed support for the position it had taken. However, by ordering a new study in 1972, the Authority clearly demonstrated its good faith and a determination to enact and enforce regulations only where there is a reasonable relation to the ends to be achieved; in this case, Parkway safety. In 1972, the regulation in question was under attack by the Petitioners who had brought suit contesting its validity in the state courts. The Authority recognized the increased use of motorcycles in the past 12 years and the possibilty that some evidence might exist which would justify some relaxation of its regulation. The Authority, therefore, ordered a new study, not to buttress an already pre-determined position as Petitioners contend, but to

avoid the expense of further litigation to defend a regulation which, although validly enacted, could be in need of revision if new evidence were shown. However, instead of citing a need for revision, the 1972 study demonstrated clearly that the same factors which existed in 1960 were still in evidence: motorcycles are incompatible with the type of vehicles and traffic encountered on the Garden State Parkway.

After considering the 1972 study, the Authority felt that regulation was still sound and that no need existed to conduct hearings for a new regulation. The actions of the Authority here did not constitute a rule making procedure which entitled this Petitioners to an opportunity to be heard. That opportunity was indeed offered to representatives of the motorcycling public in 1960 when the Authority was conducting its rule making proceedings. The New Jersey Highway Authority, under the circumstances, has in no way denied Petitioners their right to due process under the Fourteenth Amendment of the United States Constitution.

Point II

The New Jersey Highway Authority's regulation banning motorcycle operation on the Garden State Parkway complies with the equal protection clause of the Fourteenth Amendment of the United States Constitution.

Equal protection means that all persons subjected to state legislation shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed. *State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S. Ct. 374, 91 L.Ed. 422 (1947), *rehearing den'd*, 330 U.S. 853, 67 S. Ct. 673, 91 L.Ed. 1295. Equal protection does not require that all persons

be dealt with identically, but it does require that the distinction made have some relevance to the purpose for which the classification is made. *Baxstrom v. Herold*, 383 U.S. 107, 86 S. Ct. 760, 15 L.Ed.2d 620 (1966). The job of setting a particular classification is primarily for the legislature. Judicial inquiry is concerned only with the question of whether it is so lacking in any reasonable basis as to be arbitrary. *Borden's Farm Products Co. v. Ten Eyck*, 297 U.S. 251, 56 S. Ct. 453, 80 L.Ed. 669 (1936). Furthermore, a classification will not be interfered with by the courts unless it is clearly, manifestly, palpably and purely arbitrary and unreasonable. *Radice v. People of State of New York*, 264 U.S. 292, 44 S. Ct. 325, 68 L.Ed. 690 (1924). Therefore, the question presented is whether there is any rational relation between the protection of the health and safety of Parkway users and the proscription of motorcycles on that roadway. The existence of this relationship is evidenced by the reports and investigations which preceded the 1961 resolution, and is further supported by the engineering study when the 1961 resolution came under attack.

Petitioners contend that there is no factual or legal basis to treat motorcycles differently than automobiles in their use of the Garden State Parkway. However, the studies done in 1960 and 1962 clearly show the reasonableness of placing motorcycles in a different class. The evidence showed that motorcycles were involved in a disproportionate share of accidents and that this was the direct result of the design and limitations of the motorcycle itself. Furthermore, Petitioners have failed throughout the various stages of this litigation to produce any evidence of a credible nature which would tend to dispute the reasonableness of the regulation.

Petitioners further contend this evidence is insufficient to support the Authority's regulation. In the case of

Sproles v. Binford, 286 U.S. 374, 52 S. Ct. 581, 76 L.Ed. 1167 (1931), the court said:

> "To make scientific precision a criterion of constitutional power would be to subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."
>
> "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." 286 U.S. at 388-89.

That case involved a statute limiting the net load of trucks which would be permitted to operate on the state highways, and the Court upheld the statute as complying with the requirements of equal protection.

A similar case, *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177, 58 S. Ct. 510, 82 L.Ed. 734 (1938), reached the federal Supreme Court several years later. In this case South Carolina imposed restrictions on the use of its highways by certain types of trucks. Again the regulation was upheld:

> "And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state Legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to chose that one which in its opinion is best adapted to all the diverse interests involved." 303 U.S. at 190.

The court further found that only if the legislative choice is without rational basis may it be invalidated. 303 U.S. at 192.

A New York City traffic regulation prohibiting the operation on any street of an advertising vehicle unless that vehicle is engaged in the usual business of its owner and not mainly for advertising, was attacked as violating the Equal Protection clause in *Railway Express, Inc. v. State of New York,* 336 U.S. 106, 69 S. Ct. 463, 93 L.Ed. 533 (1949). The challenger's contentions were dismissed by the Court:

> "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City." 336 U.S. at 109.

It is, therefore, the Appellees-Respondents' contention, as well supported by the cases cited, that the Authority has the legislative power to decide whether or not the regulation enacted is best suited to correcting the hazardous conditions presented by the presence of motorcycles on the Parkway. The various reports contained in both the 1960 and 1972 studies more than demonstrate a reasonable relation between the restriction imposed and the ends to be accomplished. The New Jersey courts have already recognized that motorcycles present different safety hazards than other vehicles, and that governmental actions aimed at protecting other users of the highways, as well as the motorcyclists themselves, bear a real and substantial relationship to highway safety in general. *State v. Krammes,* 105 N.J. Super. 345 (App. Div. 1969); *State v. Mele,* 103 N.J. Super. 353 (Cty. Ct. 1968). It is precisely these safety hazards, as set forth in the two studies, that led the Authority to enact the regulation under attack. The Petitioners, although they may on occasion be inconvenienced, have in no way been deprived of their rights to equal protection under the Fourteenth Amendment. The United States Supreme Court, by denying the writ of certiorari,

will not only be upholding the right of the Highway Authority to act where there is a reasonable relationship to the protection of the health and safety of Parkway users, but will rightfully be rejecting the contentions of the Petitioners which have been based not on fact, but on mere opinions and speculation. Such opinions and speculation, as recognized by the courts below, are insufficient to overcome the showing of reasonableness which the Respondents have presented throughout this case.

CONCLUSION

For the reasons set forth above it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ William T. Hiering
WILLIAM T. HIERING
Attorney for the Respondents

APPENDIX

Respondents concur in the items presented by Petitioners on pages 1a through 6a of Petitioners' Appendix but wish to add in addition thereto the following:

N.J.S. 27:12B-4—There is hereby established in the State Highway Department a body corporate and politic, with corporate succession, to be known as the "New Jersey Highway Authority." The authority is hereby constituted an instrumentality exercising public and essential governmental functions, and the exercise by the authority of the powers conferred by this act in the construction, operation and maintenance of projects shall be deemed and held to be an essential governmental function of the State.

The New Jersey Highway Authority shall consist of five members, each of whom shall be a resident of the State, who shall have been a qualified elector therein for a period of at least 1 year next preceding his appointment. Each member of the authority shall be appointed by the Governor, with the advice and consent of the Senate, for a term of 5 years and shall serve until his successor is appointed and has qualified; except that of the first appointments hereunder, one shall be for a term of 3 years and one for a term of 6 years, and they shall serve until their respective successors are appointed and have qualified. The term of each of the first appointees hereunder shall be designated by the Governor. Each member of the authority may be removed from office by the Governor, for cause, after a public hearing. Each member of the authority before entering upon his duties shall take and subscribe an oath to perform the duties of his office faithfully, impartially and justly to the best of his ability. A record of such oaths shall be filed in the office of the Secretary of State.

Any vacancies in the membership of the authority occurring other than by expiration of term shall be filed in the same manner as the original appointed, but for the unexpired term only.

The Governor shall designate one of the members of the authority as chairman thereof and another member as vice-chairman thereof. The chairman and vice-chairman of the authority so designated shall serve as such at the pleasure of the Governor and until their respective successors have been designated. The authority shall elect a secretary and a treasurer who need not be members. At the option of the authority the same person may be elected to serve both as secretary and treasurer. Three members of the authority shall constitute a quorum and the vote of three members shall be necessary for any action taken by the authority. No vacancy in the membership of the authority shall impair the right of a quorum to exercise all the rights and perform all the duties of the authority.

Before the issuance of any bonds or notes under the provisions of this act, each member of the authority shall execute a surety bond in the penal sum of $25,000.00, and the treasurer shall execute a surety bond in the penal sum of $50,000,00, each such surety bond to be conditioned upon the faithful performance of the duties of the office of such member or treasurer, as the case may be, to be executed by a surety company authorized to transact business in the State of New Jersey as surety and to be approved by the Attorney General and filed in the office of the Secretary of State.

The members of the authority shall not receive compensation for their services as members of the authority. Each member shall be reimbursed by the authority for his actual expenses necessarily incurred in the performance of his duties.

N.J.S. 27:12B-5(j)—The Authority shall be a body corporate and politic and shall have perpetual succession and shall have the following powers:

(j) To establish and enforce rules and regulations for the use of any project.

N.J.S. 27:12B-18(g)—All persons operating vehicles upon any project, or seeking to do so, must at all times comply with regulations, not inconsistent with the other sections of this act, adopted by the Authority concerning types, weights and sizes of vehicles permitted to use such project, and with regulations adopted by the Authority for or prohibiting the parking of vehicles, concerning the making of turns and the use of particular traffic lanes, together with any and all other regulations adopted by the Authority to control traffic and prohibit acts hazardous in their nature or tending to impede or block the normal and reasonable flow of traffic upon such project; provided, however, that prior to the adoption of any regulations for the control of traffic on any such project, including the designation of any speed limits, the Authority shall investigate and consider the need for and desirability of such regulation for the safety of persons and property, including the Authority's property, and the contribution which any such regulation would make toward the efficient and safe handling of traffic and use of such project, and shall determine that such regulation is necessary or desirable to accomplish such purposes or one or some of them, and that upon or prior to the effective date of any such regulation and during its continuance, notice thereof shall be given to the drivers of vehicles by appropriate signs erected at the roadside or otherwise posted. The Authority is hereby authorized and empowered to make, adopt and promulgate regulations referred to in this section in accordance with the provisions hereof. Regulations adopted by the Authority

pursuant to the provisions of this section shall insofar as practicable, having due regard to the features of the project and the characteristics of traffic thereon, be consistent with the provisions of Title 39 of the Revised Statutes applicable to similar subjects. The Authority shall have power to amend, supplement or repeal any regulation adopted by it under the provisions of this section. No regulation and no amendment or supplement thereto or repealer thereof adopted by the Authority shall take effect until it is filed with the Secretary of State, by the filing of a copy thereof certified by the secretary of the Authority.